UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of April, 1982.

PRESENT: HON. IRVING R. KAUFMAN,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges,
HON. MARY JOHNSON LOWE,
District Judge sitting by designation.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MOXIE A. SHIRLEY and WILMA C. SHIRLEY, Defendants-Appellants.	81-6196

Filed April 19, 1982

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by appellants.

1. Appellants contend that section 57 of the Bankruptcy Act of 1939, 11 U.S.C. 93 (n) (1976), prohibits the Small Business Administration ("SBA") from asserting its mortgage lien against them at this time. Section 57 provides in pertinent part that: "(A)ll claims provable under this title, including all claims of the United States... which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed." The SBA did not file its claim within six months after the first meeting of creditors on June 4, 1974.

2. Section 57, however, is not applicable to the instant case. Courts have

long held that Sec. 57 deals with unsecured claims and does not apply to a holder of a valid secured lien. See DeLaney v. City and County of Denver, 185 F 2d 246, 251 (10th Cir. 1950). As a result, the SBA, as a creditor holding a valid lien, was not required to file a claim against a bankrupt debtor, but rather may rely solely upon its mortgage lien. See United States National Bank v. Chase National Bank, 331 U.S. 28 (1947). Accordingly, the SBA's failure to file a claim during the bankruptcy proceedings does not preclude it from acting on its claim now.

3. Moreover, the Shirley's interest in the property was sold by the bankruptcy trustee. Upon his appointment and qualification, title of the bankrupt's property vests in the trustee. 4A Collier on Bankruptcy, 70.04, at 49-50.2 (14th ed. 1978). If the trustee sells the property, and a court confirms the sale, title is conferred

on the purchaser. See In re Jamont, 453 F. Supp. 608, 609 (N.D.N.Y. 1978), aff'd 603 F. 2d 213 (2d Cir. 1979).

4. Here, the bankruptcy trustee sold and conveyed all right, title, and interest the Shirleys held in the mortgaged property to Harold and Edqard Billings. That sale was confirmed by the Bankruptcy Court in June, 1977. Thus, the Billingses gained all right and interest the Shirleys formerly had in the property, and the issues appellants seek to raise can only be properly advanced by the Billingses.

5. Appellants' other claims are equally without merit.

6. There was no material dispute that on May 2, 1968, a mortgage was given by Moxie Shirley as security for a promissory note executed that day. In addition, it is unchallenged that the Shirley defaulted on that note, and that its subsequent assignment to the SBA was valid. Since no

material issue was in dispute, Judge Munson properly granted the Government's motion for summary judgment.

s/ IRVING R. KAUFMAN

s/ ELLSWORTH VAN GRAAFEILAND
Circuit Judges,

s/ MARY JOHNSON LOWE
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v. 78-CV-508

MOXIE A. SHIRLEY, WILMA C. SHIRLEY
NORTHERN INSURING AGENCY, INC.,
INDUSTRIAL COMMISSION OF NEW YORK
STATE, BANK OF LAKE PLACID, RELIANCE
INSURANCE CO., HAROLD BILLINGS, and
EDWARD BILLINGS,

Defendants.

APPEARANCES:

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HOWARD G. MUNSON, C.J.

MEMORANDUM-DECISION AND ORDER

This case comes before the Court on plaintiff's motion for summary judgment against defendants Moxie and Wilma Shirley on a mortgage foreclosure action pursuant

to 15 U.S.C. 634. The pertinent facts are as follows. On May 2, 1968, Moxie and Wilma Shirley executed and delivered a promissory note for $20,000 plus interest at 6% per annum to the Bank of Lake Placid. The note provided that upon default the entire balance, principle and interest would immediately become due. The note was secured by a mortgage given by Moxie Shirley on property located in the County of Clinton, State of New York. The United States of America, through its agent, the Small Business Administration (hereinafter SBA), guaranteed 90% of defendants' debt. After defendant failed to make the scheduled payments, the Bank of Lake Placid assigned its interest to SBA on September 15, 1969, in return for satisfaction of the guarantee. Between September 15, 1969 and September 26, 1973, some payments on the debt owed SBA were made by the defendants.

On February 4, 1974, Moxie and Wilma

Shirley filed petitions in bankruptcy. Their debts were discharged on July 16, 1975. During those bankruptcy proceedings, the mortgaged property was transferred by the Trustee in Bankruptcy to Harold and Edward Billings. SBA moved to foreclose on the mortgage on October 3, 1978. See New York Real Property Law 258, schedule n; Felazzo v. Riley, 278 N.Y. 289, 16 N.E. 2d 286 (1938). SBA moved for summary judgment against the Shirley on December 10, 1979, contending that no material issues of fact existed with regard to the execution of the note and mortgage, the default on the scheduled payments, and the assignment to SBA. See Gould v McBride, 319 NYS 2d 125, 36 A.D.2d 706, aff'd, 36 NYS 2d 565 (1971), 29 NY 2d 768.

In response to SBA's motion for summary judgment, defendants Moxie and Wilma Shirley have argued: first, that the note and mortgage were not executed on the date

as set forth in plaintiff's motion papers and Rule 10(e) statement; and second, that the action is time-barred due to SBA's failure to properly prove the claim during bankruptcy proceedings. The defendants also assert that even if the action is not time-barred, the competing claims of other creditors preclude foreclosure by SBA. Finally, defendants argue that the amount in question as computed by SBA is in excess of any possible debt. After careful consideration of the arguments and documentary evidence submitted by the parties, the Court concludes that there are no material facts in dispute, and that the Government must prevail on the instant motion against defendants Moxie and Wilma Shirley as a matter of law.

As to the defendants' first claims in opposition to the plaintiff's motion, it cannot be seriously disputed that the mortgage was executed on May 2, 1968. Defendants

denial of execution is based solely on an overly "careful" reading of the Government's motion papers and Rule 10(e) statement, where the date is mistakenly listed as "May 2, 1978." In view of the documents provided by the plaintiff it appears that this is most probably a typographical error. Consequently, no material issue of fact exists as to the actual date on which the defendants' mortgage was executed.

Defendants' second claim demands more particular attention as they seek to invoke Section 57 of the Bankruptcy Act of 1939 (11 U.S.C.93n) (1976). Section 57 reads, in pertinent part:

> (n) Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed.

Defendants contend that the failure to

prove the debt evidenced by the mortgage six months after the first meeting of creditors on June 4, 1974 prevents SBA from acting on its mortgage lien now.

Section 57 is not, however, applicable in this case. As holder of a lien of mortgage by valid assignment, the United States possesses the same secured interest as that held by the original mortgagor. (See Exhibit D, Complaint). Film Associated, Inc. v Rogers, 38 A.D. 2d 6, 326 NYS 2d 413 (1977). By contrast, Section 57 only affects the status of unsecured claims. Collier on Bankruptcy, 14th Ed., Vol 3, para. 57.27, p. 427. Consequently, the United States as a creditor holding a valid lien need not file a claim at all against a bankrupt debtor, but rather, may rely solely upon its mortgage lien. United States National Bank v. Chase National Bank, 331 U.S. 28, (1946); In re Pennyrich International Inc. of Dallas, 473 F 2d 417,

421 (5th Cir. 1973). Cf: In re Fried Furniture, 293 F. Supp. 92 (E.D.N.Y. 1968), aff'd, 407 F.2d 360 (2d Cir. 1969) (creditor's chattel mortgage effective against bankrupt even though no claim was proved during bankruptcy proceedings). Thus, the SBA's silence during the bankruptcy proceedings does not preclude it from acting upon its lien now.

Defendants' next argument, that their bankruptcy discharge in 1975 extinguishes the obligation created by the mortgage, is also insupportable. A mortgage is not synonomous with a note or bond indicating personal liability. On the contrary, a mortgage is a lien for its full amount on every portion of the land covered by the mortgage. In re New York (East River Park), 118 A.D. 509, 172 N.Y.S. 50 (1918), aff'd 226 N.Y. 640. In a foreclosure proceedings a mortgage holder moves to extinguish the equitable rights of the mortgager in the

named parcel of land. Harlem Savings Bank v. Cooper, 54 Misc., 101 N.Y.S. 2d 641 (1950). The personal liability of the debtor is not a necessary part of the right to foreclosure. Baker v. Reconstruction Finance Corp., 109 F2d 336, 338 (5th Cir. 1940); 59 C.J.S. Mortgages 482, 492 (1949). Where a debt is secured by a lien of a mortgage, a bankruptcy discharge severs only the debt, it does not constitute a release from the lien. Prebyl v. Prudential Ins. Co. of America, 98 F2d 199, 200 (8th Cir.) (construing Nebraska law), cert. denied, 305 U.S. 641 (1938); Application of Halpern, 54 Misc. 541, 283 N.Y.S. 2d 89 (1967); 8B C.J.S. Bankruptcy 583 (2) (1949). Cf In re Vanity Slippers, 4 F Supp. 82 (S.D.N.Y. 1938) (holders of chattel mortgage retained right to proceeds from sale of goods named in mortgage even after bankruptcy). Therefore, defendants' 1975 discharge in bankruptcy does not

preclude foreclosure upon the lien held by the plaintiff.

Defendants' final two contentions, that SBA's right to foreclose is affected by competing claims and that the mortgage debt has been incorrectly calculated, are irrelevant to the instant dispute between SBA and Moxie and Wilma Shirley. Although it seems clear that SBA is the holder of the senior mortgage and would therefore have priority over later claimants, Meyer v. U.S., 375 U.S. 233, 236 (1963); Rivera v. Hellman, 45 Misc. 2d 891, 258 N.Y.S. 2d 25 (1965), that ultimate determination would be one made between the competing creditors. For the moment the sole issue before the Court is whether summary judgment is appropriate as against the defendants named here. Similarly, the contention that the debt as quoted by SBA is incorrect does not affect the merits of SBA's claim against the mortgaged property. Assuming

for the moment SBA succeeds in selling the property described in the mortgage and realizes either less or more than the face amount of the lien, defendants have neither a responsibility to make up the balance or an entitlement to any surplus since their rights to the land are extinguished. In any event, the amount permissibly collectable by SBA is properly determined when and if a motion for judicial sale is made.

In conclusion, there is no material dispute that on May 2, 1968, a mortgage was given by defendant Moxie Shirley as security for a promissory note executed on the same day. It is uncontroverted that default on that debt occurred where scheduled payments were not made by the defendants and that the subsequent assignment of the mortgage and note to SBA was valid. Having shown that defendants' assertions in opposition to this motion do not effect SBA's lien on the property described in

the mortgage, plaintiff's motion for summary judgment is hereby granted. Gould v. McBride, supra.

IT IS SO ORDERED.

Dated: August 5, 1981
Syracuse, New York

Howard G. Munson
Chief U.S. District Judge